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CHARLES ELMORE

No. 369. OCTOBER TERM, 1930.

IN THE

Supreme Court of the United States

THE SUSQUEHANNA POWER COMPANY, Appellant,

v.

STATE TAX COMMISSION OF MARYLAND, Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND, APRIL TERM, 1930, GENERAL DOCKET NO. 39.

STATEMENT AS TO JURISDICTION ON APPEAL UNDER RULE 13 SECTION 1.

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In the Supreme Court of the United States.

OCTOBER TERM, 1930. No. 369.

The Susquehanna Power Company, Appellant,

v.

State Tax Commission of Maryland, Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND, APRIL TERM, 1930, GENERAL DOCKET NO. 39.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Appellant hereby disclosing the basis on which it contends this Honorable Court has jurisdiction to review on appeal the judgment below, respectfully states:—

A.

This appeal is under Title 28 U. S. C. A. Section 344 (Jud. Code Section 237 amended).

Subsection (a)—"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question

the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a Writ of Error." [Now an appeal under the Act of January 31, 1928, abolishing Writs of Error, as amended by the Act of April 26, 1928. (U. S. C. A. 1929 Cumulative, Title 28 Secs. 861a, 861b) 275 U. S. at 646, 647.]

B.

This appeal is from a final judgment of the Court of Appeals of the State of Maryland, the highest Court of the State, filed June 12, 1930 (Rec. 94), and the application for appeal to this Court was presented to the Chief Judge of the Court of Appeals of Maryland on the 10th day of July, 1930 (Rec. 87), and on the same day an Order thereon of the Chief Judge of said Court granted said appeal.

C.

THE NATURE OF THE CASE AND RULINGS BELOW.

1. *The nature of the case.*

This case raises questions concerning the legality of the assessment on the capital stock of a Maryland corporation by the State Tax Commission of Maryland, all of the shares of which are held by a non-resident of that State, *i. e.*, a corporation of the Commonwealth of Pennsylvania, with its place of business in Pennsylvania and doing all of its business in Pennsylvania.

The assessment of the tax is attacked as unlawful because of (1) the arbitrary valuation thereof fixed pursuant to a statute of the State of Maryland, and (2) the owner and holder of shares of stock, being a non-resident and

subject to taxation in the Commonwealth of Pennsylvania, is entitled to an exemption from taxation by the State of Maryland upon the same property, *i. e.*, the shares of stock in question, which, not being used in the business of the Pennsylvania company in the State of Maryland, have no situs in the latter state which subjects them to taxation therein.

(*a*) The appellant is a Corporation of Maryland and one of its charters is the Act of the General Assembly of Maryland of 1908, Chapter 268, which by Section 5 thereof provides that the appellant's powers are expressly granted in "aid of the Powers of Congress" (R. p. 5), and said Appellant is a licensee of the Federal Government under The Federal Water Power Act of Congress of June 10, 1920, Chapter 285 U. S. C. A. Title 16, Chapter 12 (for copy of Appellant's License see Record in case No. 368 at p. 433). All of the capital stock of the Appellant is owned by a non-resident of the State of Maryland, viz., Philadelphia Electric Power Company, a corporation of the Commonwealth of Pennsylvania and residing in the Commonwealth of Pennsylvania (R. p. 37).

(*b*) All of the Company's shares of capital stock have been assessed for taxation in Harford County, Maryland, (R. p. 19), where the principal office is located (R. p. 12).

(*c*) The final Order of the State Tax Commission (R. p. 25) assessed the shares of capital stock of the corporation for the year 1929 at $28,726,132. and credited thereon real estate $22,726,132. leaving the net aggregate assessment on each of its 245,500 shares at $24.43 (R. p. 20), making a total net aggregate assessment on all of said stock of $6,000,000.

The cost or book value of the total assets of appellant is $46,941,680. (R. p. 15); its indebtedness is $41,954,999., its net worth therefore, that is to say, the book value of its entire outstanding capital stock is $4,866,886. (R. p. 16),

so that the book value of each of the 245,500 shares outstanding (R. p. 10) is $19.82 per share (R. p. 13). It would follow from this that after the required deduction of the taxable value of the real estate and chattels were made the assessable values attributable to the capital stock tax would be wiped out.

By Public General Laws of Maryland (1924), Art 81, Section 163, it is provided that:—

> "in no case shall the stock of any corporation, in the aggregate, be valued at less than the full value of the real estate and chattels, real or personal, held by or belonging to such corporation in the several Counties and City of Baltimore, whether the shares of said stock are quoted on the market or not;"

By Pub. Gen. Laws of Maryland (1924), Art. 81, Section 166, it is provided that the State Tax Commission

> "Shall deduct the assessed value of such real property * * * belonging to the said * * * corporations * * * from the aggregate value of all shares of such * * * corporations * * * and divide the remainder by the number of shares of the capital stock * * * and the quotient shall be the taxable value of each of such respective shares for State purposes * * * and the said taxable value of such of said stock or shares as are held by non-residents of this State, shall for county and municipal purposes be valued to the owners thereof in the County or City in which said * * * corporation * * * is situated, but all County or municipal taxes assessed upon said respective taxable value of such respective shares of stock or shares shall be collected from such * * * corporation * * * and when so paid shall or may be charged by such * * * corporation * * * to the account of such stockholders or shareholders respectively;"

The "minimum provision" in Section 163 above quoted compels the fixing of a value to the capital stock for taxation on a base, whichever may be higher, either that of the tangible property of the corporation or that of the stock. This provision requires the assessor to ignore the indebtedness of the corporation and as in the instant case results in an assessment against the stock greatly in excess of its proved value.

The "minimum provision" had never been passed upon by the Court of Appeals of Maryland, until its opinion in the instant case. It was not a point in the Corry case, 196 U. S. 466, in which the method of stock taxation was alleged to be invalid as a tax on the stockholders *without sufficient notice.*

The "minimum provision" of Section 163 above is a wholly arbitrary basis for the valuation and assessment of the shares of stock belonging to the stockholders.

Schlesinger *v.* Wisconsin, 270 U. S. 230.

The capital stock represents the net worth of the appellant, and its real value necessarily depends as much upon the appellant's debts as upon the amount of its property or assets. Section 163 simply provides that when, in the assessment of stock, it appears that direct taxation of the personalty would produce a greater tax, the stock shall be given an artificial and fiat value which bears no relation to the real value of the stock. Obviously Section 163 is not a valid exercise of taxing power, and imposes taxes arbitrarily and unreasonably by such a standard. It was decided by the Corry case, 196 U. S. at 472 that such taxes are levied *in personam* against the stockholders, on account of their ownership of the stock, so that while the instant tax is nominally levied upon the capital stock, and not directly upon the property of the corporation, yet the "minimum provision" makes the assessment in substance one laid on the tangible property of the appellant, and not on its stock. Apart from any question of double taxation the minimum clause as a basis for the assessment and tax

laid in the instant case is invalid as repugnant to the privilege and immunity, due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. It is repugnant to the equal protection clause that a non-resident stockholder of all the stock of the appellant should be taxed on an arbitrary assessment or any other basis by the State of Maryland, and at the same time be subject to an assessment and tax upon the same stock in the Commonwealth of Pennsylvania, and that the corporate stock of the appellant is so taxable to the owner thereof in Pennsylvania is settled by numerous decisions of this Court.

(*d*) The assessment complained of is based upon what is clearly an arbitrary valuation when comparison with book values is made, and as there is no market price for the stock, the only other basis for valuation is a going concern value, which is possible only by reason of the Federal franchise in the form of the License granted by the Federal Power Commission. If the latter basis is adopted the assessment on the capital stock is invalid because, of necessity, it must include a valuation for assessment of the Federal License, and this Court has refused to allow the states to tax property exempt from state taxation because of its Federal status by indirection for the same reasons that it has denied the right to tax directly. As, for instance, the income from patents under a State income tax law and taxes applicable to sales to Federal instrumentalities.

Long *v.* Rockwood, 277 U. S. 142;
Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218;

And also an indirect method of taxing income from United States Bonds was held unconstitutional in that respect as indirectly in substance laying a tax on exempt securities.

Macallen Co. *v.* Massachusetts, 279 U. S. 620.

The federal franchise of the License to the appellant is exempt, and its inclusion in the mass of property covered

by general assessment has been held to make the entire assessment invalid.

California *v.* Pacific, 127 U. S. 1, 35, 40-45.

(*e*) Further under the recent decisions of this Court the State of Maryland cannot tax shares of stock in a Maryland corporation which are the property of a non-resident stockholder, by assessing the same to such non-resident at the domicil of the corporation as was done in the instant case. This point was raised by the protest filed with the State Tax Commission (R. p. 22), and at the appeal filed in the Circuit Court for Harford County (R. 80). And that protest ran to the assessability of the stock as a whole and not to any legal principles which applied to its valuation. It can no longer be doubted that intangible property has only one situs for taxation and that that situs is the State of the residence of the owner.

Safe Deposit *v.* Virginia, 280 U. S. 83-93-97;
Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204, 209-215;
N. J. Bell Tel. Co. *v.* State, 280 U. S. 338;
Baldwin *v.* Missouri, 281 U. S. 586;
Brinkerhoff Trust & Savings Co. *v.* Hill, 281 U. S. 673.

A question similar to the question raised on this appeal is now before this Court on Re-argument in Beidler *v.* South Carolina.

2. *The rulings below.*

The Court of Appeals of Maryland sustained the assessment of the tax upon the shares of stock of The Susquehanna Power Company, owned and held by Philadelphia Electric Power Company, a corporation of and resident in the Commonwealth of Pennsylvania, and held that there was no arbitrary valuation of the shares of stock, and that the valuation fixed did not necessarily include the value of the

franchise rights created under the license of the Federal Power Commission; and further held that there was no decision of the Supreme Court of the United States which deprived the State of Maryland of its right to tax the shares of stock owned by a non-resident because this right had been recognized in the case of Corry *v.* Baltimore City, 96 Maryland, 310, and had not been disturbed by any of the later decisions. These conclusions set forth in full in the opinion of the Court of Appeals (Record, p. 95) seem to have no sufficient support in the facts before that Court or in the decisions of this Court to sustain them.

> "Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."
>
> Broad River *v.* South Carolina, 281 U. S. 540.

> "Neither ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States."
>
> Missouri *v.* Gehner, 281 U. S. 321.

D.

Citation of cases to sustain jurisdiction:—

Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204;
Safe Deposit & Trust Co. *v.* Virginia, 280 U. S. 83;
N. J. Bell Tel. Co. *v.* State, 280 U. S. 338;
Schlesinger *v.* Wisconsin, 270 U. S. 230;
Long *v.* Rockwood, 277 U. S. 142;
Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218;
Macallen Co. *v.* Massachusetts, 279 U. S. 620;
California *v.* Pacific R. R., 127 U. S. 1;

Baldwin *v.* Missouri, 281 U. S. 586;
Brinkerhoff T. & S. Co. *v.* Hill, 281 U. S. 673;
Beidler *v.* South Carolina—U. S. Supreme Court pending;
Missouri *v.* Gehner, 281 U. S. 321;
Broad River *v.* South Carolina, 281 U. S. 540.

The jurisdiction of this Court would seem to be clear.

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